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LUMINENT 2007-1

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA - FRESNO DIVISION

In re
JAMES GIBBS,
Debtor(s).

Case No. 10-64039-A

Chapter 7

D.C. No. PD-1

MOTION FOR RELIEF FROM
AUTOMATIC STAY AND
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF
(11 U.S.C. § 362 and Bankruptcy Rule 4001)

HSBC BANK USA, NATIONAL
ASSOCIATION AS TRUSTEE FOR
LUMINENT 2007-1,

LBR 4001-1 and 9014-1(f)(1)

Movant,

DATE: March 1, 2011
TIME: 1:30 p.m.
CTRM: 11

vs.

JAMES GIBBS, Debtor(s); SHERYL ANN
STRAIN, Chapter 7 Trustee,

2500 Tulare Street,
Fresno, CA 93721-1318

Respondents.

HSBC Bank USA, National Association AS TRUSTEE FOR LUMINENT 2007-1¹
("Movant"), moves this court for an order terminating the automatic stay of 11 U.S.C. § 362 as to

¹ This Motion for Relief from Automatic Stay shall not constitute a waiver of the within party's right to receive service pursuant to Fed. R. Civ. P. 4, made applicable to this proceeding by Fed. R. Bankr. P. 7004, notwithstanding Pite Duncan, LLP's participation in this proceeding. Moreover, the within party does not authorize Pite Duncan, LLP, either expressly or impliedly through Pite Duncan, LLP's participation in this proceeding, to act as its agent for purposes of service under Fed. R. Bankr. P. 7004.

1 Movant, so that Movant may commence and continue all acts necessary to enforce its security
2 interest in real property generally described as 35443-35449 Tule River Drive, Springville, CA
3 93265.

4 On or about December 3, 2010, James Gibbs ("Debtor") filed a voluntary petition under
5 Chapter 7 of the Bankruptcy Code, and Sheryl Ann Strain was appointed as Chapter 7 Trustee. As a
6 result of said filing, certain acts and proceedings against Debtor and the bankruptcy estate are stayed
7 as provided in 11 U.S.C. § 362.

8 Movant moves this court for relief from stay under 11 U.S.C. §§ 362(d)(1) and 362(d)(2).

9 **MEMORANDUM OF POINTS AND AUTHORITIES**

10 **I.**

11 **MOVANT IS ENTITLED TO RELIEF FROM THE**
12 **AUTOMATIC STAY UNDER 11 U.S.C. § 362(d)(2).**

13 **NO EQUITY**

14 11 U.S.C. § 362(d)(2) provides that relief from the automatic stay shall be granted if the
15 debtor does not have any equity in the property and the property is not necessary to the debtor's
effective reorganization.

16 In In re San Clemente Estates, 5 B.R. 605 (Bankr. S.D. Cal. 1980), the court stated that:
17 § 362(d)(2) reflects congressional intent to allow creditors to
18 immediately proceed against the property where the debtor has no
19 equity and it is unnecessary to the reorganization, even where the
debtor can provide adequate protection under § 362(d)(1). (Emphasis
added).

20 Id. at 610 (emphasis added).

21 In In re Mikole Developers, Inc., 14 B.R. 524, 525 (Bankr. E.D. Pa. 1981), the court stated
22 that in determining whether equity exists in the property for purposes of § 362(d)(2), all
23 encumbrances are totaled, whether or not all the lienholders have joined in the request for relief from
24 stay. The Ninth Circuit has concurred with this view in Stewart v. Gurley, 745 F.2d 1194 (9th Cir.
25 1984).

26 An appropriate cost of sale factor should also be added to determine if the debtor has any
27 equity in the property. La Jolla Mortgage Fund v. Rancho El Cajon Associates, 18 B.R. 283, 289
28 (Bankr. S.D. Cal. 1982).

1 On or about September 15, 2006, Barbara Kenton-Gibbs ("Borrower"), for valuable
2 consideration, made, executed and delivered to Washington Mutual Bank, FA ("Lender") a Note in
3 the principal sum of \$281,250.00 (the "Note"). Pursuant to the Note, Borrower is obligated to make
4 monthly principal and interest payments commencing November 1, 2006, and continuing until
5 October 1, 2036, when all outstanding amounts are due and payable. The Note provides that, in the
6 event of default, the holder of the Note has the option of declaring all unpaid sums immediately due
7 and payable. A copy of the Note is attached to the concurrently served and filed Exhibits to the
8 Declaration in Support of Motion for Relief From Automatic Stay ("Exhibits") as exhibit A and
9 incorporated herein by reference.

10 On or about September 15, 2006, the Borrower made, executed and delivered to Lender a
11 Deed of Trust (the "Deed of Trust") granting Lender a security interest in real property commonly
12 described as 35443-35449 Tule River Drive, Springville, CA 93265 (the "Real Property"), which is
13 more fully described in the Deed of Trust. The Deed of Trust provides that attorneys' fees and costs
14 incurred as a result of the Debtor's bankruptcy case may be included in the outstanding balance
15 under the Note. The Deed of Trust was recorded on September 22, 2006, in the Official Records of
16 Tulare County, State of California. A copy of the Deed of Trust is attached to the Exhibits as
17 exhibit B and incorporated herein by reference.

18 Subsequently, Lender's beneficial interest in the Deed of Trust was assigned and transferred
19 to Movant. A copy of the Corporation Assignment of Deed of Trust evidencing the Assignment of
20 the Deed of Trust to Movant is attached to the Exhibits as exhibit C and incorporated herein by
21 reference.

22 Movant is unaware of the method by which Debtor has acquired an interest in the Real
23 Property, but is informed and believed that Debtor has demonstrated an interest by listing the Real
24 Property in his Bankruptcy Schedules.

25 The obligation under the Note is in default as of June 1, 2010, for failure to make payments
26 to Movant. As of December 11, 2010, the total obligation due and owing under the Note is in the
27 approximate amount of \$295,251.22, representing the principal balance in the amount of
28 \$272,102.80, interest in the sum of \$13,562.80, late charges in the amount of \$1,148.51, escrow

1 advances in the amount of \$8,259.71, recoverable balance in the amount of \$134.00, and other fees
2 in the amount of \$43.40. This is an approximate amount for purposes of this Motion only, and
3 should not be relied upon as such to pay off the subject loan as interest and additional advances may
4 come due subsequent to the filing of the Motion. An exact payoff amount can be obtained by
5 contacting Movant's counsel. Further, Movant has incurred additional post-petition attorneys' fees
6 and costs in bringing the instant Motion. Moreover, the total arrears under the Note are in the
7 approximate sum of \$27,313.17, excluding the post-petition attorneys' fees and costs incurred in
8 filing the instant Motion. An additional payment will come due on January, and on the 1st day of
9 each month thereafter.

10 II.

11 RELIEF FROM STAY

12 LACK OF EQUITY

13 Movant is informed and believes that, based on the Debtor's bankruptcy Schedules and
14 Statements, the fair market value of the Property is approximately \$235,000.00. Copies of the
15 Debtor's bankruptcy Schedules "A" and "D" are collectively attached to the Exhibits as exhibit D
16 and incorporated herein by reference.

17 Based on the above, Movant maintains that the equity in the Property is as follows:

18 Fair Market Value:	\$235,000.00
19 Less:	
20 Movant's Trust Deed	\$295,251.22
Costs of Sale (8%)	<u>\$18,800.00</u>
Equity in the	\$<79,051.22>
Property:	

21 As a result, there is no equity in the Property for the bankruptcy estate. Moreover, since this
22 is a Chapter 7 proceeding, there is no reorganization in prospect. As a result, Movant is entitled to
23 relief from the automatic stay pursuant to 11 U.S.C. § 362(d)(2).

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25 /././

26 /././

27 /././

28 /././

III.
**MOVANT IS ENTITLED TO RELIEF FROM THE
AUTOMATIC STAY UNDER 11 U.S.C. § 362(d)(1).**

CAUSE - LACK OF ADEQUATE PROTECTION

Pursuant to the provisions of 11 U.S.C. §§ 361 and 362(d)(1), Movant is entitled to adequate protection of its interest in the Property.

Movant submits that adequate protection in this case requires normal and periodic cash payments, as called for by the Note, plus the repayment of any and all delinquent amounts owed to Movant, including all attorneys' fees and costs incurred in the filing of this motion.

Movant is informed and believes that Debtor is presently unwilling or unable to provide adequate protection to the Movant and there is no probability that adequate protection can be afforded to Movant within a reasonable time.

By reason of the foregoing, Movant is entitled to relief from stay under 11 U.S.C. § 362(d)(1), based upon the failure of Debtor to provide adequate protection to Movant.

WHEREFORE, Movant respectfully prays for an Order of this court as follows:

1. Terminating the automatic stay of 11 U.S.C. § 362, as it applies to the enforcement by Movant of all of its rights in the Real Property under the Note and the Deed of Trust;

2. That the 14-day stay described by Bankruptcy Rule 4001(a)(3) be waived;

3. Granting Movant leave to foreclose on the Real Property and to enforce the security interest under the Note and the Deed of Trust, including any action necessary to obtain possession of the Property;

4. Permitting Movant to offer and provide Debtor with information re: a potential Forbearance Agreement, Loan Modification, Refinance Agreement, or other Loan Workout/Loss Mitigation Agreement, and to enter into such agreement with Debtor;

5. Alternatively, in the event this court declines to grant Movant the relief requested above, Movant requests that an Order for adequate protection be issued, requiring the Debtor to reinstate and maintain in a current condition all obligations due under the Note and Deed of Trust and all other deeds of trust encumbering the Real Property, including Debtor's obligations to pay when due (a) the monthly installments of principal and interest, as required under the Note;

1 (b) tax/insurance obligations; and (c) any sums advanced by Movant on behalf of Debtor in order to
2 protect Movant's interest in the Real Property, including all attorneys' fees and costs incurred in the
3 filing of this motion;

4 6. That the attorneys' fees and costs incurred by Movant for filing the instant Motion be
5 included in the outstanding balance of the Note as allowed under applicable non-bankruptcy law;
6 and

7 7. For such other and further relief as the court deems just and proper.

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9 Dated: January 28, 2011

PITE DUNCAN, LLP

10 /s/ PARADA KOVADI (CA SBN 272724)
11 PARADA KOVADI
12 Attorneys for HSBC BANK USA,
13 NATIONAL ASSOCIATION AS
14 TRUSTEE FOR LUMINENT 2007-1
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